No. 86-21

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

VIRGINIA HECTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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TABLE OF AUTHORITIES

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1. Respondent does not seriously dispute the existence of a conflict in the circuits on the issue presented in this case: whether an alien may demonstrate extreme hardship to "his * * * child" for purposes of obtaining a suspension of deportation under the Immigration and Nationality Act (the Act), 8 U.S.C. 1254(a)(1), by showing hardship to persons who do not fall within the statutory definition of "child" (8 U.S.C. 1101(b)(1)). As respondent acknowledges (BR. in Opp. 9), the Third Circuit's ruling in the present case, which is consistent with the approach of the First Circuit, differs from the approach taken by the Fifth and Ninth Circuits. Respondent tries to minimize the inter-circuit conflict by pointing out (*ibid.*) that it stems not from a dispute over statutory construction but rather from a disagreement over the interpretation of this Court's decisions in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), and *INS* v. *Phinpathya*, 464 U.S. 183 (1984). That fact, however, merely accentuates the need for review by this Court, for we maintain

that the court of appeals' decision not only conflicts with the law in two other circuits but is also inconsistent with *Jong Ha Wang* and *Phinpathya*.

2. Notwithstanding this conflict in the circuits, respondent asserts that the issue in this case is not worthy of review by this Court because it is "arcane" and "probably unimportant" (Br. in Opp. 3). As we demonstrated in our petition (Pet. 11-13), however, Congress carefully defined the term "child", has amended that definition, and has made clear that the definition is fundamental to the fair and uniform administration of the immigration laws. Indeed, the legislative history reveals the particular importance of the term "child" in the context of suspension of deportation (see *id.* at 11-12). This Court also has addressed at length the meaning and importance of the statutory definition of "child." See *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (discussed at Pet. 14-15). Thus, the issue of who constitutes an alien's "child" under the immigration laws is a question of substantial importance.[1]

While statistics do not exist on the number of times the precise question of a de facto parent-child relationship has arisen before the INS, the issue clearly is not "arcane" or unique. As we noted in our petition (Pet. 19 n.9), the issue

[1]Respondent does not even address, let alone answer, our discussion of the legislative history and *Fiallo*. Respondent does note, however (Br. in Opp. 6-7), that in 1962, Congress amended the suspension of deportation statute by changing the requirement of "exceptional and extremely unusual hardship" to "extreme hardship" for purposes of 8 U.S.C. 1254(a)(1). Nonetheless, that legislation did not broaden the scope of persons whose hardship may be considered and it in no way suggested that Congress's carefully drafted definition of "child" in 8 U.S.C. 1101(b)(1) henceforth should be disregarded. Cf. *Phinpathya*, 464 U.S. at 191-192 n.9 (1962 amendment changing statutory language to "extreme hardship" did not affect the literal interpretation to be given to the phrase "continuous physical presence").

has been litigated in several courts of appeals. Respondent argues (Br. in Opp. 5) that the impact of the court of appeals' decision is nonetheless limited because it will not result in a "full blown trial" each time a de facto parent-child relationship is alleged. As respondent notes (*ibid.*), immigration judges "retain broad discretion to exclude testimony which is not material." That argument, however, misses the whole basis of INS's concern. Under the Third Circuit's approach, a purported de facto parent-child relationship is plainly material, and, as the facts of this case demonstrate, the immigration authorities will be compelled, as a practical matter, to admit evidence concerning such a relationship or face the risk of a later remand.[2]

3. On the merits, respondent errs in contending (Br. in Opp. 7-8) that *Jong Ha Wang* and *Phinpathya* are distinguishable because those cases involve mere exceptions to a purported general rule that the remedy of suspension of

[2]No basis for denying review is provided by respondent's suggestion (Br. in Opp. 5) that "[i]t is highly unlikely that the result of [the court of appeals'] remand would be different * * *." We have assumed that respondent, in raising the issue in this case with the court of appeals in the first place, fully expected that a remand by the court of appeals could well result in suspension of deportation. But even if respondent is conceding that the facts of her case are in any event insufficient to justify suspension of deportation, review by this Court is nevertheless needed to foreclose future litigation based on the court of appeals' erroneous interpretation of the immigration statute. See generally *INS* v. *Rios-Pineda*, No. 83-2032 (May 13, 1985), slip op. 6 (noting incentive of deportable aliens to prolong litigation to postpone deportation).

Respondent errs in further contending (Br. in Opp. 3-4) that the court of appeals' error is "harmless" because the Board of Immigration Appeals (BIA), on remand, must in any event look at the hardship to respondent caused by the hardship to the nieces. The court remanded the case to the BIA solely on the issue of hardship to respondent's nieces, having specifically ruled that respondent had failed to make a sufficient showing of extreme hardship to herself (Pet. App. 3a, 5a).

deportation is to be liberally construed to protect "immediate family members." This Court has made clear that suspension of deportation is an exceptional and highly restrictive remedy. See *Jong Ha Wang*, 450 U.S. at 145; *Phinpathya*, 464 U.S. at 195-196; see also S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952); H.R. Rep. 1365, 82d Cong., 2d Sess. 62-63 (1952). Moreover, as we explained in our petition (Pet. 11-12), Congress explicitly rejected the term "immediate family" in formulating the focus of the hardship inquiry for suspension of deportation.

Finally, respondent contends (Br. in Opp. 5-6), citing no authority, that the definition of "child" in 8 U.S.C. 1101(b)(1) applies only to the issuance of visas and not to suspension of deportation. The definition, however, applies, by its terms, to "subchapters I and II" of the Act. Subchapter I contains the general provisions governing the Act, while Subchapter II contains provisions governing the admissibility, entry, and expulsion of aliens (see 8 U.S.C. 1151-1363). Section 1254, which deals with suspension of deportation, is clearly part of Subchapter II, and the definition of "child" in 8 U.S.C. 1101(b)(1) therefore applies. Since the statutory definition of child is thus controlling, the courts have no authority to expand upon or disregard it. See *Fiallo* v. *Bell, supra.*

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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